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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-911

JOSEPH M. DRISCOLL,

Petitioner,

—v.—

INTERNATIONAL UNION OF OPERATING ENGINEERS,

Respondent,

LOCAL 139,

—and—

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. .....

JOSEPH M. DRISCOLL,

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139,

Respondent,

—and—

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Joseph M. Driscoll, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on September 11, 1973.

Opinions Below

The opinion of the United States Court of Appeals is not yet reported. It is set forth in the Appendix, *infra,* pp. 1a-14a. The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 339 F.

Supp. 757 (1972) and is set forth in the Appendix, *infra*, pp. 15a-25a.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 11, 1973. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether §102 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §412, confers jurisdiction upon a federal district court over an action alleging that the imposition of a non-Communist affidavit requirement as a condition for inclusion on the ballot in local union elections violates a candidate's right to free speech protected by §101(a)(2) of the LMRDA, 29 U.S.C. §411(a)(2)?

2. Whether the imposition of a non-Communist affidavit requirement as a condition for inclusion on the ballot in local union elections, sanctioned by §§401(e) and 504 of the LMRDA, 29 U.S.C. §§481(e), 504, constitutes such "governmental action" as lodges a federal district court with jurisdiction under 28 U.S.C. §1331 over an action alleging that the affidavit requirement abridges rights protected by the First and Fifth Amendments to the United States Constitution?

3. Whether the imposition of a non-Communist affidavit requirement as a condition for inclusion on the ballot in

local union elections violates a candidate's rights to freedom of speech and assembly protected by §101(a)(2) of the LMRDA, 29 U.S.C. §411(a)(2)?

4. Whether the imposition of a non-Communist affidavit requirement as a condition for inclusion on the ballot in local union elections violates a candidate's right to free speech and association, and due process of law, protected by the First and Fifth Amendments to the United States Constitution?

Constitutional and Statutory Provisions Involved

This case involves the First and Fifth Amendments to the United States Constitution and various provisions of the Labor-Management Reporting and Disclosure Act of 1959, which are included in the Appendix, *infra*, pp. 26a-30a.

Statement of the Case

On June 12, 1968, Plaintiff-Petitioner Driscoll, a member in good standing of Local 139 of the International Union of Operating Engineers, was nominated for the office of treasurer of the Local (Stip. ¶3).[1] Upon nomination, the union sent him two documents for his signature, an acceptance of nomination and a non-Communist affidavit, both of which were required by the International Union of Operating Engineers Constitution (Stip. ¶4, Exhib. "C").

The Constitution of the International Union, Art. XXIII, subdiv. 1 §(b) (1968 Amendment), prescribes certain terms

[1] The stipulation of facts was agreed upon by the respective parties and approved by the District Court on October 19, 1970. A copy of the stipulation appears in the Original Record as Item No. 7.

that govern eligibility for candidacy for office in affiliated local unions such as Local 139 (Stip. ¶2, Exhib. "B").

> No member shall be eligible for election, be elected nor hold office . . . unless he shall have filed with the Recording-Corresponding Secretary of the Local Union within ten days after having been notified in writing by the Recording-Corresponding Secretary of his nomination to Local Union office, *a non-Communist affidavit* and a written acceptance of his nomination to office . . . . (Emphasis added.)

The International's constitution does not prescribe the language to be used in the non-Communist affidavit, leaving this to the discretion of the Executive Board of the Local Union. Article XXIII, Subdiv. 1 §(d) (Stip. ¶2, Exh. "B"). Accordingly, Local 139 tendered the following affidavit to petitioner:

> I swear that I am not at the present time or have ever been a member of the Communist Party or any other subversive organization dedicated to or advocating the overthrow of the Government of the United States (Stip. ¶4, Exh. "D").

Recognizing the constitutional infirmities of this affidavit, respondents revised it in April 1971 for the 1971 election to read as follows:

> I swear that I am not a member of the Communist Party or other organization that advocates the overthrow of the United States Government by force or violence, knowing of and sharing in such advocacy and acting pursuant to the teaching that the United States

Government should be overthrown by such means. (Supplemental Affidavit of Joseph J. Goetz, Jr., dated April 3, 1971. Item No. 12, Record.)

Petitioner signed the acceptance of nomination but mailed back the non-Communist affidavit without a signature (Stip. ¶4, Exh. "D"). In a letter dated July 3, 1968, the business manager of Local No. 139 called to Driscoll's attention the fact that he would not be eligible to run for office unless he executed the affidavit by July 8, 1968 (Stip. ¶5, Exh. "E"). On July 5, Driscoll responded that he had not executed the non-Communist affidavit because "the United States Supreme Court ruled that section of the labor law unconstitutional" (Stip. ¶5, Exh. "F"). On July 8, Local No. 139's election committee ruled that Driscoll was ineligible to run for office because of his failure to execute a non-Communist affidavit as required by the International's Constitution (Stip. ¶6, Exh. "G").

On July 10, petitioner was informed of his ineligibility (Stip. ¶7). He then wrote to the General President of the International Union restating his conviction that execution of the non-Communist affidavit was unconstitutional and requesting that the election committee be instructed to place his name on the ballot (Stip. ¶7, Exh. "H"). By letter dated July 28, 1968 the General President responded that he could not comply with Driscoll's request (Stip. ¶8, Exh. "I"). The decision was promptly appealed to the General Executive Board of the International Union (Stip. ¶9, Exh. "J," "K"). On January 15, 1969, petitioner was informed by letter from the General Secretary of the International Union that the appeal had been denied (Stip. ¶16, Exh. "S").

On March 11, 1969, Driscoll filed a complaint with the United States Department of Labor pursuant to Title IV of the LMRDA, 29 U.S.C. §§481-483 (Stip. ¶17, Exh. "T"). The Labor Department processed the complaint and, on May 1, 1969, Driscoll was informed that his "complaint to the Secretary of Labor alleging violations of §401 of the . . . [LMRDA, 29 U.S.C. §481] . . ." had been investigated, and that it had "been determined that this case is not suitable for litigation under §402 of the Act [29 U.S.C. §482]" (Stip. ¶17, Exh. "U").

On January 29, 1970, petitioner commenced this action in the United States District Court for the Eastern District of Wisconsin challenging the constitutionality of this requirement. His complaint asked that the requirement for elective office in the Local Union, namely that a candidate sign a non-Communist affidavit before his name can be placed on the ballot, be declared void and unconstitutional. The Complaint also asked that the respondents be enjoined from excluding qualified candidates from office under the guise of the affidavit requirement, and that the respondents be directed to accept qualified candidates without regard to whether they have signed a non-Communist affidavit.

The Complaint alleged that respondents' refusal to place petitioner's name on the ballot because of his refusal to comply with the affidavit requirement violated his rights under the First and Fifth Amendments to the United States Constitution and his rights under the Labor Management Reporting and Disclosure Act, Title 29 U.S.C. §411. The Complaint further alleged that the district court had jurisdiction to entertain petitioner's claims under 29 U.S.C. §412. In addition, petitioner's amended complaint alleged that the action arose under the Constitution of the United

States, and that the matter in controversy exceeds the amount of ten thousand dollars exclusive of interest and costs. Jurisdiction was also claimed by virtue of Title 28 U.S.C. §§1331 and 1337.

On March 4, 1971, respondents filed a motion to dismiss for lack of jurisdiction or, alternatively, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On March 23, 1972, the district court issued its order and opinion dismissing the complaint for want of jurisdiction over the subject matter, and deciding each of the jurisdictional issues against Driscoll. In doing so, the court concluded that the International Union's action did not involve sufficient governmental activity to invoke the proscriptions of the First and Fifth Amendments to the United States Constitution. Thus, jurisdiction could not be claimed under 28 U.S.C. §1331. The court also found that there was no basis for jurisdiction under the LMRDA on the grounds that the rights asserted by petitioner were not related to the Bill of Rights guarantees of that Act, 29 U.S.C. §411. Consequently, jurisdiction could not be claimed under 29 U.S.C. §412 which provides for judicial review of claims arising under 29 U.S.C. §411. Nor could jurisdiction be claimed under 28 U.S.C. §§1331 and 1337. On September 11, 1973, the Court of Appeals affirmed in all respects.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to clarify the scope of this Court's decision in *Calhoun* v. *Harvey*.

The first question presented in this petition is important because clarification is needed of the scope of *Calhoun* v. *Harvey*, 379 U.S. 134 (1964), and because the issues and conflicts which this Court sought to resolve by its decision in *Calhoun* remain extant.

Those issues concern the interplay between Title I and Title IV of the LMRDA. Although the rights protected by Title I and Title IV overlap to some extent, the remedies available under each Title differ markedly. Title I authorizes a private action to redress infringement of the rights it secures. By contrast, Title IV does not permit private actions. Instead, it sets up a procedure for filing a complaint with the Secretary of Labor who may in turn bring an action in federal court to contest the validity of an election. This Title IV remedy is declared to be the exclusive manner of challenging an election already conducted.

Calhoun, the only case in which this Court considered the relationship between Title I and Title IV, was an action by several union members against the union and two of its officers. The complaint alleged that certain provisions of the bylaws and the union constitution denied rights protected by §101(a)(1), 29 U.S.C. §411(a)(1), the "equal rights" provision. Jurisdiction was alleged under §102, 29 U.S.C. §412.

The union bylaws complained of provided that a member could only nominate himself. The national constitution provided that, to be eligible, a candidate must have been a member of the national union for five years, and have served 180 or more days of sea time in each of two of the preceding three years on vessels covered by collective bargaining agreements with the union. The plaintiffs sought an injunction against future union elections until reasonable eligibility requirements were established.

This Court held that the district court was correct in dismissing the complaint. "Jurisdiction of the District Court under §102 of Title I depends entirely upon whether this complaint showed a violation of rights guaranteed by §101 (a)(1) . . . . " 379 U.S. at 138.

In applying this principle to the case before it, this Court properly looked behind the complaint's conclusory allegation of a denial of "equal rights," to determine whether the facts alleged could fairly be read as manifesting such a denial. After examining the complaint, the Court concluded, "The complaining union members here have not been discriminated against in any way and have been denied no privilege or right to vote or nominate which the union has granted to others . . . . Whether the eligibility requirements set by the union's constitution and bylaws were reasonable and valid is a question separate and distinct from whether the right to nominate on an equal basis given by §101(a)(1) was violated." 379 U.S. at 139.

The eligibility requirements at issue in *Calhoun* were not relevant in assessing whether a claim under Title I was alleged, because those requirements did not themselves deny Title I rights; the only objection to them was that they

were "unreasonable" and hence denied Title IV rights. As the Court ruled, " . . . possible violations of Title IV of the Act regarding eligibility are not relevant in determining whether or not a district court has jurisdiction under §102 of Title I of the Act." 379 U.S. at 139-140.

The Court's process of decision was no different from the process it employs in determining whether, in a complaint alleging general federal question jurisdiction under 28 U.S.C. §1331, the proffered federal claim is "frivolous or a mere matter of form." C. Wright, *Law of Federal Courts* 62 (2d ed. 1970). See *Bell* v. *Hood,* 327 U.S. 678, 682-83 (1946), cited in *Calhoun,* 379 U.S. at 137 n. 9.

Mr. Justice Stewart, joined by Mr. Justice Harlan, concurred in the *Calhoun* decision. They agreed with the majority that the pleadings were inadequate, and certainly that there was no showing of a denial of the equal right to nominate. They were concerned, however, that the Court's broad language might in a later case unduly restrict the availability of private remedies for violations of Title I rights. Mr. Justice Douglas dissented.

A. *The Decision of the Court Below Brings Into Question This Court's Decision in* Calhoun v. Harvey.

The court below incorrectly applied *Calhoun* to the undisputed facts in this case. The court below appears to have read *Calhoun* as holding that, in any case where there is arguably an overlap between Title IV and Title I, there is never jurisdiction under §102, even if a non-frivolous Title I claim is alleged.[2] That result is not compelled by the

[2] The only exception the court below was willing to entertain would be a case challenging a " . . . candidacy requirement that is part of a purposeful program of suppressing any expression of

Calhoun holding, nor is it supported by the policies behind Title IV.

The essential distinction between *Calhoun* and this case is that the complaint filed in this case plainly stated a claim under §101(a)(2), the "free speech" provision, without regard to the "reasonableness" under Title IV (specifically, §401(e), 29 U.S.C. §481(e)), of the non-Communist affidavit requirement. Thus, this case is quite different from *Calhoun* because it squarely presents the question whether a well pled complaint alleging a violation of Title I of the LMRDA, that does not depend on possible Title IV violations, states a private cause of action over which federal district court jurisdiction lies pursuant to §102 of the LMRDA, despite the fact that the union practice challenged involves the election process.

Another striking difference exists between this case and *Calhoun*. None of the purposes Congress sought to achieve in Title IV's exclusive enforcement machinery support the result reached below. These purposes were identified in *Calhoun*, as follows. First, Congress believed it was not desirable to allow "individuals to block or delay union elections by filing federal-court suits for violation of Title IV." 379 U.S. at 140. Second, "Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies . . . ." 379 U.S. at 140.

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dissent by plaintiff. . . ." or an eligibility requirement that ". . . that is a discriminatory, *ad hoc* device calculated to perpetuating certain individuals in office." App., *infra*, p. 7a. No analysis is provided to justify making only this one extraordinary exception to the otherwise preclusive force of Title IV. The court below was merely attempting to rationalize its decision with the conflicting one of the Second Circuit in *Shonfeld* v. *Penza*, 477 F.2d 899 (2d Cir. 1973).

Third, when a union fails to remedy election difficulties internally, Congress chose "to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." 379 U.S. at 140.

In *Calhoun*, where the complaint was addressed to the reasonableness of the eligibility requirement, these goals were furthered by limiting the remedy to that provided by Title IV. These policies do not, however, support the result reached below.

First, the relief prayed for in the complaint did not seek to "block or delay" any election. Petitioner alleged his continuing desire to be a candidate. He will be satisfied if the relief sought is implemented at the first regularly scheduled election after the successful termination of the litigation. He does not seek to upset the result of any prior election. Moreover, in a case like the instant one, which does not require a trial to find facts, the legal issue of the validity of the oath requirement can be resolved expeditiously.

Second, free speech issues such as these do not lend themselves to internal resolution by a union. Indeed, resort to a private action under §101(a)(2) has often been necessary to redress union action infringing upon free speech rights. See, e.g., *International Brotherhood of Boilermakers* v. *Rafferty*, 348 F.2d 307 (9th Cir. 1965); *Salzhandler* v. *Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963); *Retail Clerks, Local 648* v. *Retail Clerks International Ass'n*, 299 F. Supp. 1012 (D.D.C. 1969).

Third, the free speech issues presented here are not within the special competence of the Secretary of Labor. Furthermore, First Amendment rights are too precious to

be left to government administrators for their enforcement. Experience has taught that such officials are not vigilant in protecting these rights. Cf., e.g., *Stewart* v. *Washington*, 301 F. Supp. 610 (D.D.C. 1969) (3-judge court) (loyalty oath for federal employees invalidated).

An additional ground relied on by the court below was that, in its view, *Calhoun* precludes the availability of any pre-election relief. This Court has not read *Calhoun* so broadly. Thus, in *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 531 (1972), *Calhoun* was cited for the following proposition: "This Court has held that §403 prohibits union members from initiating a private suit to set aside an election."

Moreover, since post-election relief is clearly precluded by Title IV, a preclusion of all pre-election relief as well would eliminate private federal remedies over any claim which even indirectly pertains to election matters. Such a result would surely satisfy the fears expressed by Justices Stewart and Harlan in their concurring opinion in *Calhoun*. 379 U.S. at 141-47. Such a result is not justified by the language of Title IV. Section 403 of that Title, 29 U.S.C. §483, specifically provides that existing pre-election rights shall not be affected by this "subchapter," and that the "subchapter" provides the sole remedy for challenging an election already conducted. The "subchapter" consists only of Title IV.

B. *There Is a Conflict Between the Court Below and Other Circuits Over the Meaning of* Calhoun v. Harvey.

An additional reason for granting certiorari on the first question presented is that the decision below conflicts with the decisions of other federal courts.

The sharpest conflict exists with the Second Circuit's holding in *Schonfeld* v. *Penza*, 477 F.2d 899 (2d Cir. 1973), which involved a free speech claim which could also have been made under Title IV. A union official was removed from office and declared ineligible for office for five years. Plaintiffs sought injunctive relief against the removal and against an interim election to replace the ousted official. The court of appeals recognized that a violation of rights protected by Title IV (specifically, §401(e), 29 U.S.C. §481 (e)) was alleged, since plaintiffs complained of a removal from office and declaration of ineligibility to run for office. 477 F.2d at 902. The plaintiffs further alleged, however, that these actions infringed upon free speech rights protected by §101(a)(2), 29 U.S.C. §411(a)(2), because they had the effect of suppressing dissent within the union. 477 F.2d at 903. The Court, acting with restraint and deciding no more than necessary to find jurisdiction, held,

> The competing values between Title I rights and Title IV procedural requirements are best reconciled, in our opinion, by limiting initial federal court intervention to cases where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union. 477 F.2d at 904.

The Seventh Circuit, below, found *Schonfeld* v. *Penza* to be factually distinguishable. This is too facile. Freedom of speech is important, and not only in the context of a "history of union fractionalism." 447 F.2d at 903. To so limit intra-union free speech is to engraft a grandfather clause on Title I by saying that only dissenters of long

standing have free speech rights enforceable in a private action. Even assuming arguendo that there was not a long history of attempts to exclude "Communists" from the IUOE,[3] the newness of the speech or its suppression is not a rational basis for treating it differently from other dissent.

Other cases within the Second Circuit, analogous to *Schonfeld* v. *Penza* insofar as jurisdiction under Title I was upheld even though the plaintiff's claim arguably fell within Title IV as well, are *Navarro* v. *Gannon,* 385 F.2d 512, 520 (2d Cir. 1967), *cert. denied,* 390 U.S. 989 (1968) (international union's supervision of local's meetings, although arguably an infringement of the right to vote protected by §401(e), 29 U.S.C. §481(e), held to violate §§101 (a)(1) and (2), 29 U.S.C. §§411(a)(1), (2), and thus the district court had jurisdiction under §102, 29 U.S.C. §412); *Schonfeld* v. *Raftery,* 335 F. Supp. 846 (S.D.N.Y. 1971) (Lasker, J.) (jurisdiction upheld in action alleging that voting scheme prescribed by by-laws and constitution violates Title I rights; *Calhoun* distinguished on ground that no relief sought with respect to conduct of any particular election); *O'Brien* v. *Paddock,* 246 F. Supp. 809 (S.D.N.Y.

[3] Communists, in fact, have long been unwelcome in the IUOE. The 1968 version of the constitution provides, as it has for some time, that any member "guilty" of belonging to the Communist Party "shall forthwith be expelled from membership or otherwise disciplined . . . ." Art. XVI, section 4. See also Art. I, section 2. See G. Mangum, *The Operating Engineers* 235 (1964). The constitution is a document, amended as of April 1968, that was initially compiled and adopted in 1938. Amendments were also made in 1940, 1944, 1947, 1948, 1951, 1952, 1956, 1960 and 1964. Counsel for the petitioner have been able to examine copies of the versions that were extant between 1938 and 1968, except those of 1944, 1947, 1951 and 1954. The provision quoted above does not appear in the 1938 or 1940 versions; it does appear in the 1948 version.

1965) (Cooper, J.) (jurisdiction upheld in action properly alleging denial of equal rights to nominate and vote; *Calhoun* distinguished since instant case involved no issue of reasonableness).

The decision below also conflicts with a series of Third Circuit decisions. In that circuit, "[M]erely because a particular violation is covered by both Title I and Title IV, a private pre-election suit under §102 is not barred." *Amalgamated Clothing Workers Rank and File Comm.* v. *Amalgamated Clothing Workers,* 473 F.2d 1303, 1306 (3d Cir. 1973). Accord, *DePew* v. *Edmiston,* 386 F.2d 710 (3d Cir. 1967).

II.

The decision of the court below is inconsistent with this Court's decision in *Moose Lodge No. 107* v. *Irvis* and conflicts with a decision of the Fourth Circuit.

The decision below on the second question presented in this petition conflicts with this Court's holding in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972),[4] and with the Fourth Circuit's *en banc* holding in *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964).

Moose Lodge, insofar as it is pertinent here, held that a "neutral" Liquor Control Board regulation, which required licensees to adhere to all provisions of their constitutions and bylaws, "place[d] state sanctions behind" dis-

[4] While *Moose Lodge* dealt with "state action" for purposes of 42 U.S.C. §1983, we believe the same standard applies to the question whether there is sufficient "governmental action" to trigger jurisdiction under 28 U.S.C. §1331.

criminatory bylaws. 407 U.S. at 177-79. This was held to constitute state action. 407 U.S. at 179.

The role played by the Liquor Control Board regulation in *Moose Lodge* is performed in this case by §§401(e) and 504 of the LMRDA, 29 U.S.C. §§481(e), 504, and by §9(h) of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. §159(h) (repealed in 1959). Section 504 makes it a crime for a member of the Communist Party to serve as an officer or employee of a labor union. Section 401(e) provides that a candidate's eligibility for office is "subject to section 504." Section 9(h) required labor unions to file non-Communist affidavits with the federal government.

The court below took the position that the record "does not indicate" that the union's affidavit requirement was imposed "in response to" §9(h) of the LMRA, which was repealed in 1959. The court stated that, had the record so indicated, a "different issue" would be presented. App., *infra*, p. 13a, n. 23.

Nothing in *Moose Lodge,* nor in any other precedent, requires a plaintiff to make such a causal showing. Rather, the very existence of these federal statutes "place[s] state sanctions", 407 U.S. at 178, behind otherwise private action and subjects the action thus sanctioned to constitutional limitations. Further, it is plainly inferable that there is an intimate relationship between the affidavit requirement and these federal statutes;[5] and there is nothing in

[5] The general anti-communist provisions in the IUOP constitution appear to have been added by amendment in 1948, the year after enactment of §9(h) of the LMRA, 29 U.S.C. §159(h). See, *supra*, n. 3, p. 15. The express requirement of a non-Communist affidavit as a condition to local office candidacy was not included in the

the record to suggest the contrary. Cf., *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963); *cert. denied,* 376 U.S. 939 (1964).

Although in *United States* v. *Brown,* 381 U.S. 437 (1965), §504 was held to be an unconstitutional bill of attainder in violation of Article I, §9 of the Constitution, we do not believe that this precludes a finding of "governmental action." In the first place, *Simkins* indicates that the unconstitutionality of a statute does not avoid a finding that the statute sanctions the otherwise private action. In *Simkins,* the issue was whether actions of the defendant private hospitals were "governmental action." The court found "governmental action," in the racially discriminatory policies of the hospitals because part of the Hill-Burton Act, 60 Stat. 1041 (1946), then codified at 42 U.S.C. §291e(f), and a regulation pursuant thereto, authorized construction of hospital facilities with federal funds on a "separate-but-equal" basis. The significance of *Simkins* for present purposes, is that the court found "governmental action" notwithstanding its further holding that the Hill-Burton Act and implementing regulation were unconstitutional.

Second, regardless of the status of §504, still another provision of the LMRDA, §401(e), 29 U.S.C. §481(e), remains in force and continues to sanction the respondents' non-Communist affidavit. The court below held that §401(e) does not sufficiently ratify the union's actions to convert them into government action because: "The enactment of §401(e) has neither enhanced the union's power over candidacy requirements nor diminished plaintiffs' rights."

1948 version of the constitution. It does appear in the 1952 version of the constitution in virtually the same form it takes in the 1968 version.

Appendix, *infra*, p. 12a. This holding, too, conflicts with the Fourth Circuit's decision in *Simkins*. The government statutes and regulations involved in that case also were permissive. As the Fourth Circuit held: "It is settled that governmental sanction need not reach the level of compulsion to clothe what is otherwise private discrimination with 'state action.'" *Simkins, supra*, 323 F.2d at 968.[8]

III.

The Court should rule on the scope of Section 101 (a)(2) of the LMRDA, the free speech provision of the LMRDA.

The third question presented furnishes this Court with the opportunity to rule for the first time on the substantive content of §101(a)(2), 29 U.S.C. §411(a)(2). The courts below did not reach this issue, but were this Court to hear the jurisdictional issues, we believe it would promote judicial efficiency for it to hear simultaneously the merits of the case.

The meaning of §101(a)(2) has been extensively litigated in the lower federal courts. This section has been held to protect libelous and defamatory statements, *Giordani* v. *Upholsterers International*, 403 F.2d 85 (2d Cir. 1968);

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[8] If certiorari is granted on this issue, petitioner will present additional argument that the requisite "governmental action" also flows from the fact ". . . that unions, although traditionally regarded as private entities, have been subjected to extensive governmental regulation and have been granted various powers by governmental agencies." Appendix, *infra*, p. 11a. Petitioner will also present argument that ". . . the failure of the Secretary of Labor to institute Title IV proceedings on his [petitioner's] original complaint amounts to an official participation in the unconstitutional acts of the defendants." Appendix, *infra*, p. 12a.

Cole v. *Hall,* 339 F.2d 881 (2d Cir. 1965), leafleting, *International Brotherhood of Boilermakers* v. *Rafferty,* 348 F.2d 307 (9th Cir. 1965); *Farowitz* v. *Associated Musicians, Local 802,* 330 F.2d 999 (2d Cir. 1964), the writing of newspaper articles, *Deacon* v. *Operating Engineers, Local 12,* 273 F. Supp. 169 (C.D. Cal. 1967), and picketing, *Graham* v. *Soloner,* 220 F. Supp. 711 (E.D. Pa. 1963).

Petitioner agrees with these decisions giving a liberal construction to §101(a)(2), and submits that, properly interpreted, the section should be enforced as a rough analog to the First Amendment to the United States Constitution. Under this interpretation, the respondents' non-Communist affidavit requirements would be declared unlawful.

IV.

If the action of the respondents is "governmental action," this Court should decide whether that action is unconstitutional.

The fourth question presented is important because the oath requirement, which the decisions below allow to stand, abridges petitioner's First and Fifth Amendment rights. This issue, like the preceding one, was not reached below, but we believe it would be most efficient for this Court to hear all the issues together.

First, on its face, the oath violates the First Amendment by impairing the free and effective presentation of diverse views in union elections. The right to vote, which is "preservative of all rights," *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886), is intimately related to the right of candidates, parties, and factions to be included on the ballot. See *Wil-*

liams v. *Rhodes,* 393 U.S. 23 (1968). Accordingly, exclusions from the ballot based on political views have been struck down. *Whitcomb* v. *Indiana Communist Party,* 410 U.S. 976 (1973), *aff'g per curiam,* —— F. Supp. —— (N.D. Ind. 1972) (state statute requiring an organization seeking certification as political party to file affidavit "that it is not affiliated with and does not cooperate with or have any relations with any foreign government" is unconstitutionally vague and overbroad);[7] *Feinglass* v. *Reinecke,* 48 F. Supp. 438 (N.D. Ill. 1942); *Communist Party of the United States* v. *Peek,* 20 Cal. 2d 536, 127 P.2d 889 (1942); *Imbrie* v. *Marsh,* 3 N.J. 578, 71 A.2d 352 (1950). As Professor Thomas I. Emerson has written:

> Qualifications for access to the ballot grounded upon conduct otherwise protected as expression would seem to present the clearest possible case for application of the full protection rule [of the First Amendment]. It is difficult to see how the social interest in internal security is served by exclusion of a political party from the political process. T. Emerson, *The System of Freedom of Expression* 202 (1970).

At the very least, the First Amendment limits the oath that may be imposed upon one seeking or holding office to a simple affirmation to uphold the Constitutions of the United States and the union. *Cole* v. *Richardson,* 405 U.S. 676 (1972); *Connell* v. *Higginbotham,* 403 U.S. 207 (1971). *Compare* U.S. Const., Art. II, §1, cl. 8; Art. VI, cl. 3.

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[7] Argument in the appeal of the companion case, *Communist Party of Indiana* v. *Whitcomb,* U.S. S. Ct. No. 72-1040 was conducted on October 16, 1973. Substantive issues similar to those asserted under this point in the Petition were briefed and argued in that appeal.

Second, the requirement of the international union constitution that candidates sign a "non-Communist affidavit," and the oaths required by the local in this case, are unduly broad, vague and uncertain. It is by no means clear that a so-called negative loyalty oath can ever be valid. In a series of decisions, this Court has made it clear that no negative loyalty oath that requires the affidavit to disclaim association with an organization can be valid, unless it requires both knowledge of the unlawful purposes of the organization and a specific intent to further those purposes. *Whitehill* v. *Elkins,* 389 U.S. 54 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966). Cf., *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964). Plainly, Article XXIII, subdiv. 1, §(b), of the constitution of the international union is invalid since it is not so limited.

Both oaths tendered to petitioner are also unconstitutional. (See, *supra,* pp. 4-5 where the oaths are quoted.) They are required only because of Article XXIII, subdiv. 1, §(b) of the international union's constitution and therefore are tainted by the infirmities of that provision. See *Whitehill* v. *Elkins,* 389 U.S. 54 (1967); *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966). Standing on their own bottoms, too, they are too vague. Considering the second oath tendered, which is the more specific of the two, a person may "act" pursuant to his beliefs lawfully or unlawfully. As this Court stated in *Baggett* v. *Bullitt,* 377 U.S. 360, 368 (1964):

> Teaching and advising are clearly acts . . . . The question put by the Court in *Cramp* [v. *Board of Public Instruction,* 368 U.S. 278 (1961)] may with equal force be asked here. Does the statute reach endorsement or support for Communist candidates for office? Does it

reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by the Communists or the Communist Party?

The oath, if not unduly vague, is overbroad. The oath appears to reach all "acting" including advocating the overthrow of the Government by force or violence. But such advocacy is not illegal unless "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969).

Third, the affidavit requirement denies procedural due process of law. No mechanism is provided by which the candidate can receive clarification of the oath or may explain a refusal to take the oath. Such a failure denies due process. *Connell* v. *Higginbotham,* 403 U.S. 207 (1971).

An additional reason for granting certiorari on this issue is to rule on the viability of *American Communication Ass'n* v. *Douds,* 339 U.S. 382 (1950), which had sustained §9(h) of the LMRA, 29 U.S.C. §159(h). In their briefs submitted in the lower courts, the defendants placed their chief reliance, on the merits, on *Douds.* We believe that *Douds,* although never expressly overruled, has been severely undermined by more recent decisions. In *United States* v. *Brown,* the Ninth Circuit took precisely this view of *Douds,* 334 F.2d 488, 492-95 (9th Cir. 1964). This Court, voided §504 as a bill of attainder, without deciding the First Amendment question or reconsidering *Douds. United*

States v. *Brown*, 381 U.S. at 440. In view of the continued reliance placed on *Douds*, its continued vitality should be reviewed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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